APPEAL NO. 161605
FILED SEPTEMBER 19, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 4, 2016, with the record closing on July 13, 2016, in (city) , Texas, with (hearing officer). presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to disc bulge at C2-3, bulging/protruding disc at C3-4, protruding/herniated disc at C4-5, protruding/herniated disc at C5-6, disc bulge at C6-7, facet degeneration, or mild central canal stenosis; (2) the appellant (claimant) had disability resulting from an injury sustained on (date of injury), from December 10, 2014, through January 19, 2015; (3) the claimant reached maximum medical improvement (MMI) on January 4, 2016; (4) the claimant's impairment rating (IR) is five percent; and (5) the average weekly wage (AWW) is $1,127.43.

The claimant appealed, disputing the hearing officer's determinations of the extent of the compensable injury, MMI, IR, and AWW. The claimant argues that the evidence supports that the compensable injury extends to the disputed conditions. The claimant further contends that the preponderance of the other medical evidence is contrary to certification of MMI/IR determined by the hearing officer. Additionally, the claimant contends that the hearing officer's determination of the AWW was error because he did not work for the employer for the 13 consecutive weeks immediately preceding the injury. The respondent (carrier) responded, urging affirmance of the disputed extent, MMI, IR, and AWW determinations.

The hearing officer's determination that the claimant had disability resulting from an injury sustained on (date of injury), from December 10, 2014, through January 19, 2015, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of at least a cervical sprain/strain, distal nasal bone fractures, and facial fractures. The claimant testified that he was injured while trying to open a pressurized sandblasting tank.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to disc bulge at C2-3, bulging/protruding disc at C3-4, protruding/herniated disc at C4-5, protruding/herniated disc at C5-6, disc bulge at C6-7, facet degeneration, or mild central canal stenosis is supported by sufficient evidence and is affirmed.

MMI

The hearing officer's determination that the claimant reached MMI on January 4, 2016, is supported by sufficient evidence and is affirmed.

IR

The hearing officer's determination that the IR is five percent is supported by sufficient evidence and is affirmed.

AWW

Section 408.041(a) provides that a full-time employee's AWW shall be determined by dividing the wages from the 13 weeks preceding the compensable injury by 13. *See also* 28 TEX. ADMIN. CODE § 128.3(d) (Rule 128.3(d)). If a full-time employee did not work for the employer for the 13 weeks preceding the compensable injury, the AWW is calculated using "the usual wage that the employer pays a similar employee for similar services." Sections 408.041(b)(1) and 408.041(b)(2); Rule 128.3(e). If neither of the foregoing methods can "reasonably be applied," because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the AWW is determined "by any method" that the Texas Department of Insurance, Division of Workers' Compensation (Division) considers "fair, just, and reasonable to all parties and consistent with the methods established under [the 1989 Act]." Section 408.041(c); Rule 128.3(g).

The claimant testified that he worked for the employer in sandblasting and painting. He worked at a location in Houston making $21.00 per hour but was told about a job in Carrizo Springs for the employer also in sandblasting and painting that would pay $19.00 per hour but included a per diem of $125.00. The claimant testified that he was told he would have to quit the job in Houston and wait a month before he could get the new job at Carrizo Springs. The claimant quit his position in Houston and waited a month before beginning the new job in Carrizo Springs for employer. Further, the claimant testified that he worked 2 weeks for a different employer in Corpus Christi while waiting the month before he could begin his new position in Carrizo Springs. The claimant began the job in Carrizo Springs in August prior to the (date of injury), date of

injury. The hearing officer noted that there was no information in the record relating to a same or similar employee.

In his Discussion of the evidence the hearing officer stated: "[t]here was no question that [the] claimant worked for the employer from April 2014, until he was terminated on December 10, 2014. Although he did not work for the employer for 13 consecutive weeks immediately preceding the date of injury, this was a voluntary choice made by him not to work from July 14, 2014, to August 10, 2014." The hearing officer then noted that Section 408.041(c) should not apply because the claimant's choice was not due to "illness, weather, or another cause beyond the control of employee." The hearing officer applied Section 408.041(a) to calculate the AWW.

It was error for the hearing officer to apply Section 408.041(a) to determine the AWW in this case. The evidence is undisputed that the claimant did not work for the employer for the 13 consecutive weeks prior to the date of injury. The claimant quit working for the employer and worked for a different employer for a 2-week period prior to being re-hired by the employer to work in a different position in a different location. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is $1,127.43 and remand the AWW issue to the hearing officer. Under the facts of this case, the hearing officer should use a fair, just, and reasonable method to calculate the claimant's AWW pursuant to Section 408.041(c) and Rule 128.3(e) and (g).

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to disc bulge at C2-3, bulging/protruding disc at C3-4, protruding/herniated disc at C4-5, protruding/herniated disc at C5-6, disc bulge at C6-7, facet degeneration, or mild central canal stenosis.

We affirm the hearing officer's determination that the claimant reached MMI on January 4, 2016.

We affirm the hearing officer's determination that the IR is five percent.

We reverse the hearing officer's determination that the claimant's AWW is $1,127.43, and remand the AWW issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to calculate the claimant's AWW using the fair, just, and reasonable method supported by the evidence, pursuant to Section 408.041(c) and Rule 128.3(e) and (g).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge